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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JOHN C. HUMPHREY
W.C. GARBEZ
ROBERT D. SMITH

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY FOR
WRIT OF CERTIORARI

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1. THE SEARCH OF THE BELOW DECK CABIN
AND BATHROOM OF THE ORCA WENT FAR BEYOND
U.S. v. VILLAMONTE-MARQUEZ

The government concedes the search of the ORCA was far from customs waters and at random absent any grounds. The ORCA was not in trouble or violation of regulations.

The government concedes U.S. v. Villamonte-Marquez, 462 U.S. 579 (1983) limited random vessel stops to on deck document inspections. Nevertheless, the government and 9th Circuit both claim the unlimited search of the ORCA's private cabin and bathroom was not "materially different" than the on deck inspection sanctioned in Villamonte-Marquez. (Government's Brief at 6.) The frailty of the government's position underscores the necessity for review. Chief Justice Rehnquist, in Villamonte-Marquez held

that below deck searches would constitute a much deeper intrusion, stating:

...It [on deck document checks] involves only a brief detention where officials come on board and visit public areas of the vessel and inspect documents.... Neither the [vessel] nor its occupants are searched.... 462 U.S. at 584.

The government argues the 9th Circuit properly applied Villamonte-Marquez. However, the Coast Guard did not limit the search of the ORCA to on deck checks. It searched the entire cabin and bathroom. The Coast Guard made no efforts to inspect safety certificates which might have obviated the need for a search. Chief Justice Rehnquist specifically noted that on deck document checks will satisfy any government interest in compliance with safety regulations. See U.S. v. Villamonte-Marquez, supra, at 591. Neither the government nor the 9th Circuit suggests why on deck document checks would

not insure safety compliance regarding the ORCA's bathroom.

The 9th Circuit and government have misconstrued Villamonte-Marquez to permit unlimited searches of below deck private areas. Absent review, there will be no Fourth Amendment rights remaining at sea in the 9th Circuit since this case sanctions the unlimited search of the ORCA.

2. THE COAST GUARD WAS NOT LEGITIMATELY BELOW DECK

The Coast Guard had no basis for going below deck. Nothing in Villamonte-Marquez, supra, permits a search below deck to secure lawfully stored weapons. There was not reasonable grounds that there was any threat. All crew were on deck, visible and cooperative. Ybarra v. Illinois, 100 S.Ct. 339 (1980) holds that police may not conduct brief frisks for weapons absent reasonable grounds. Many boats and homes have legal

weapons. That fact alone does not justify entry, let alone unlimited searches of an entire home or boat.

3. THERE WAS NO CONSENT TO SEARCH THE CABIN OR BATHROOM OF THE ORCA

The government incorrectly suggests there was consent to enter the private cabin. Prior to boarding, the Coast Guard via radio warned the ORCA that an armed party would inspect the ORCA to "enforce compliance with U.S. laws...". [M.H. 25.] The ORCA stated there was no need for an armed boarding but was again warned that a Coast Guard crew would conduct an armed inspection in spite of objection. [M.H. 25.] Mr. Humphrey cooperated only when directed by Lt. Rutz to show him weapons, life jackets, the extinguisher, and the toilet. However, he was never given a choice. Lt. Rutz did not testify he relied on or asked for consent.

4. THE NINTH CIRCUIT ELIMINATED THE FOURTH AMENDMENT FOR PRIVATE AREAS AT SEA. THE SEARCH WAS NOT LIMITED TO SECURING WEAPONS.

The government argues the 9th Circuit opinion was "narrow" since it concluded the Coast Guard was legitimately below deck to check for weapons. (Government's Brief at 4.) However, the search of the ORCA was unlimited. Once the weapon was secured, the 9th Circuit still sanctioned an unlimited search of the cabin and bathroom. This search was well after the weapon was secure and unrelated to securing weapons.

Even if the Coast Guard could briefly secure weapons, this did not justify the search of the entire cabin and bathroom. The weapon was at the bottom of the stairs, nowhere near the toilet where the marijuana was later discovered. Once the Coast Guard secured the weapon, they did not return to deck, but rather searched the entire cabin, including the bathroom. By sanctioning this

limitless search, the 9th Circuit eliminated the Fourth Amendment for all private areas of vessels. /1

5. THE SEARCH OF THE ORCA'S TOILET WAS UNRELATED TO SAFETY

The government argues the search of the ORCA's bathroom was justified for safety. However, the 9th Circuit and government cannot explain how the toilet could possibly relate to safety.

Toilet regulations were not enforceable in the high seas and no citation could have issued. The government nowhere argues why on deck inspections of certificates of compliance could not enforce these regulations.

/1 It is hard to imagine any Fourth Amendment protections now remain for private areas of sailboats. The Coast Guard will now always claim the need to look briefly below deck to secure weapons and once below, will search all private areas to insure compliance with "regulations" as now sanctioned by the 9th Circuit.

6. THE SPLIT IN THE CIRCUITS SHOULD BE RESOLVED TO GIVE GUIDANCE TO LAW ENFORCEMENT

The government concedes this issue is causing a split in the circuits. Absent resolution, law enforcement agencies will remain confused and be encouraged to forum shop when boats are stopped in international waters.

The government understates the split in the circuits. The 2d, 3d and 4th Circuits prohibit random document checks absent reasonable grounds.^{/2} The 1st, 5th and 11th Circuits permit random document checks, but even these circuits limit inspections to nonprivate areas and would prohibit searches of the ORCA's private cabin or bathroom as

^{/2} See pp. 9-12 of opening Petition discussing U.S. v. Quemener, 789 F.2d 145, 154 (2d Cir. 1986); U.S. v. Pinto-Mejia, 720 F.2d 248, 262 (2d Cir. 1983); U.S. v. Wright-Barker, 784 F.2d 161, 176 (3d Cir. 1983); U.S. v. Manbeck, 744 F.2d 161 (4th Cir. 1984).

sanctioned by the 9th Circuit.^{/3} The government does not address the confusion in the 9th and 5th Circuits which disagree even amongst its own panels.^{/4}

The government argues the split in the circuits was before Villamonte-Marquez. However, numerous cases decided after Villamonte-Marquez require reasonable grounds to search private areas of vessels. (See opening Petition at 9-12, n. 5-12.) Since Villamonte-Marquez did not address below deck searches, it did not resolve this major circuit split. Contrary to the government,

^{/3} See opening Petition at 10-12, discussing U.S. v. Burke, 716 F.2d 935 (1st Cir. 1983); U.S. v. Williams, 617 F.2d 1063 (5th Cir. en banc, 1980); U.S. v. Lopez, 761 F.2d 632 (11th Cir. 1983).

^{/4} See opening Petition at pp. 12-13, discussing other 9th Circuit panels which have required reasonable grounds or an administrative plan for document checks as well as the disagreements in the 5th Circuit where ten judges would require reasonable grounds for even a brief safety check in public areas.

the split in the circuits is causing chaos and should be resolved.

7. CONCLUSION

Contrary to the government, the limitless search of the below deck private cabin and bathroom of the ORCA goes well beyond the on deck inspection of documents sanctioned in Villamonte-Marquez. The random search of private areas as now sanctioned by the 9th Circuit, is contrary to Villamonte-Marquez which specifically held that on deck document checks will satisfy any government interest in regulations.

The Coast Guard could not go below deck absent reasonable grounds to seize the lawfully stored weapon. Even if they could, they did not limit the search to securing the weapon. After the weapon was secured they searched the entire cabin and bathroom before finding marijuana.

Contrary to the government, there was no consent asked for nor obtained to search the ORCA. Mr. Humphrey cooperated only after told over the radio that in spite of his objection they would conduct an armed inspection. He cooperated only as ordered.

The split in the circuits is major and causing chaos. Most circuits would prohibit the limitless and random search of the ORCA's private bathroom which was sanctioned by the 9th Circuit.

Finally, contrary to the government, this is not a "narrow" case. The 9th Circuit has eliminated the Fourth Amendment for all private areas of vessels. No opinion is imaginable which is more sweeping or offensive to the future of the Fourth Amendment at sea.

DATED this 18th day of February, 1987.



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